

Environmental law: Two big victories

The Supreme Court and a Washington, D.C. District Court brought environmental lawyers glad tidings on June 11 and 12, as they handed down two significant rulings on clean air and the breeder reactor.

Chronologically, the high court acted first, upholding the Sierra Club's contention that the Environmental Protection Agency (EPA) cannot permit a "significant" deterioration of air quality standards in those areas of the country that already meet or exceed clean air standards under the Clean Air Act of 1970.

Less than 24 hours later, the U.S. Court of Appeals in Washington overturned a lower court and held that the Atomic Energy Commission must file an environmental impact statement on the entire Liquid Metal Fast Breeder Reactor program now in its early development stages. The case was brought by the Natural Resources Defense Council on behalf of the Scientists' Institute for Public Information.

The decision in the Sierra Club case had been eagerly awaited by both sides because it promised to have a major effect on the nation's air clean-up program in the years to come. Roughly 90 percent of the United States is not suffering from severe air pollution, and, until this case was decided, it seemed likely that those regions might be the recipients of development and heavy industry which would degrade their air quality below existing levels.

When filing the suit in 1972, the Sierra Club was particularly concerned about the Four Corners region of the Southwest and the Montana-Wyoming area — both regions of clean air and plentiful coal deposits. Until this lawsuit, gigantic electric utility developments threatened to take advantage of the vast resources and low demand of the regions to generate power for the West Coast and Midwest. Now, EPA will be allowed to permit such development only if "significant" air quality deterioration does not take place.

Two aspects of the decision may lead to future problems. One is the definition of the word "significant." The other is the manner in which the judges decided the outcome.

The Supreme Court justices divided

on the outcome 4-4 with Judge Lewis Powell, Jr. abstaining. In the event of tie votes, the lower court decision — in this case, finding for the Sierra Club — is upheld, but the Justices' votes are not revealed and no written decision is released.

Since the court did not issue a written opinion, there are different interpretations of what "significant" means. Bruce Terris, attorney for the Sierra Club, would like to see some specific numbers used in determining the amount of degradation allowed.

"As an approximate figure," he told *Environmental Action*, "we would like to see them hold the pollution increase to 10 percent above what exists now."

Because of the complex situation, though, observers foresee additional legislation on the issue in the future.

"This decision, whether or not there is more litigation, is very important," Terris explained. "I think we'll see smaller power plants more widely separated. There will be much more pressure for energy conservation. And, for the first time, there will have to be some overall site planning as far as clean air goes. Most important, utilities now know they can't avoid the air pollution regulations by moving."

In the breeder decision, the court found that the Atomic Energy Commission (AEC) was wrong in not issuing an environmental impact statement on the entire breeder program. The AEC has argued that the National Environmental Policy Act (NEPA) required only statements on the breeder's various components, such as the Fast Flux Test Facility, rather than the whole program. Natural Resources Defense Council attorney Gus Speth, however, contended that only through an environmental overview could the entire program be satisfactorily evaluated.

The court found for the environmentalists unanimously. In the decision, Judge Skelley Wright wrote, "Taking into account the magnitude of the ongoing federal investment in this program, the controversial environmental effects attendant upon future widespread deployment of breeder reactors should the program fulfill present expectations, the accelerated pace under which this program has moved beyond pure scientific

research toward creation of a viable, competitive breeder reactor electrical energy industry, and the manner in which investment in this new technology is likely to restrict future alternatives, we hold that . . . a detailed statement about the program, its environmental impact and alternatives thereto is presently required."

Speth said the decision has a number of "firsts" in it. The government, he contended, will now have to tell the public what is involved in large research projects before they get past the point of no return. Furthermore, he added, "We hope we can now focus public attention on whether this reactor should be a top-priority federal program."

The Liquid Metal Fast Breeder Reactor is being held out as the nation's solution to the energy crisis by the AEC, many congressmen and the President. Environmentalists strongly oppose its development because of the severe dangers its operation poses and because there is no known way to store its waste by-products safely.

In the court proceedings, the AEC took the position that filing an environmental statement on the whole project would be like "inquiring into a crystal ball." That argument was rejected by the justices on the grounds that the AEC apparently has little difficulty making projections for such unknowns as nuclear fuel supply, energy demand and growth or, in fact, a detailed cost-benefit analysis of the breeder to the year 2000.

"We cannot ignore the fact," the justices held, "that the anticipated effects of the LMFBR program on the environment are among the most significant, and most controversial, of all federal programs. We deal here with a radical change in the manner in which our entire nation produces electricity....The Commission itself concedes it is expected that by the year 2000 some 600,000 cubic feet of high-level concentrated radioactive wastes will have been generated....The environmental problems attendant upon processing, transporting and storing these wastes, and the other environmental issues raised by widespread deployment of LMFBR power plants, warrant the most searching scrutiny under NEPA."

Peter Harnik